BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AMADO CORTEZ	)	
Claimant	)	
	)	
VS.	)	Docket No. **1,065,092**
	)	
GENERAL MOTORS, LLC.	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of the November 13, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven Howard. Michael Wallace, of Shawnee Mission, Kansas, appeared for claimant. Elizabeth Dotson, of Kansas City, Kansas, appeared for the self-insured respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript dated July 23, 2013, the preliminary hearing transcript, with exhibits, dated November 12, 2013, and all pleadings contained in the administrative file.

The ALJ found claimant was entitled to $500 unauthorized medical for his bilateral cubital syndrome. Based on Dr. Carabetta's report, the ALJ denied claimant's request for medical treatment of his cervical spine.

ISSUES

Claimant argues the ALJ erred in denying claimant's request for medical treatment for his cervical spine.

Respondent contends the ALJ's Order should be affirmed.

There only issue for Board review is: did claimant sustain personal injury by accident to his cervical spine?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the July 23, 2013 preliminary hearing, the ALJ stated:

> Based upon that discussion [among the ALJ and counsel], I will authorize Dr. Vito Carabetta to perform an independent medical examination regarding claimant's bilateral upper extremities, left shoulder, and neck to determine prevailing factor and if there's a need for additional medical care. Parties are directed to send a joint letter to said physician regarding what we're requesting, also to have no ex parte communications with the doctor.[1]

On July 25, 2013, the ALJ entered a Preliminary Order that appointed Dr. Carabetta to perform a neutral medical evaluation and to address prevailing factor and need for treatment concerning claimant's bilateral upper extremities, left shoulder and neck. Board review of the July 25, 2013 Preliminary Order was not requested.

Another preliminary hearing was held on November 12, 2013. The ALJ entered another preliminary hearing Order on November 13, 2013, which is now pending before the Board.

Claimant began working for respondent on October 30, 1979. Claimant worked at respondent's Fairfax plant for approximately 7 years performing the job of door-fitter, which required repetitive lifting overhead and bending while retrieving doors in order to place them into a robot. Claimant testified he reached for and lifted 400 doors per shift. He developed tingling in his hands and pain in his left arm and neck and alleged repetitive trauma ending on August 30, 2012.

Claimant advised his supervisor of his symptoms and sought medical treatment from the plant physician. Claimant was treated with ice and pain medication. He was later referred to a surgeon, Dr. Paul Nassab. An MRI of claimant's neck and EMG testing were ordered.

The October 15, 2012 MRI of claimant's cervical spine revealed severe cervical stenosis at C3-4 from a prominent posterior disk osteophyte formation; flattening at the C3-4 level; cord edema and myelomalacia; bilateral neural foraminal narrowing at C4-5 and C5-6; advanced facet joint hypertrophy; and cervical stenosis at C6-7 from a left paracentral disk osteophyte complex.

On October 24, 2012, an EMG of claimant's bilateral upper extremities was performed and revealed mild left carpal tunnel syndrome and ulnar nerve entrapment bilaterally. Another EMG was performed on March 6, 2013, which revealed the same result.

---

[1] P.H. Trans. (Jul. 23, 2013) at 3.

Respondent declined to authorize medical treatment for claimant's neck, so he sought treatment on his own from his family physician. The doctor referred claimant to Dr. Clinefelter for neck injections.

Dr. Edward Prostic evaluated claimant on May 21, 2013, at the request of his counsel. Dr. Prostic reviewed medical records, took a history and performed a physical examination. He opined claimant sustained repetitive trauma from reaching overhead and intermittent lifting. Dr. Prostic diagnosed peripheral nerve entrapment, impingement syndrome of the left shoulder, and cervical myeloradiculopathy. Dr. Prostic recommended claimant be referred to a neurosurgeon for a possible decompression and fusion at C3-4. In Dr. Prostic's opinion, claimant's repetitive work was the prevailing factor in causing the injury, medical condition and need for medical treatment.

On May 30, 2013, claimant was evaluated by Dr. Chris Fevurly at the request of respondent's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Fevurly diagnosed cervical cord impingement and myelomalacia from severe cervical stenosis which is the primary cause of his neck, hands and shoulder symptoms. The cause of the cervical cord impingment and myelomalacia is degenerative disk changes at C3-4 and bone spondylosis. Dr. Fevurly opined that claimant's genetics, living and aging caused the degenerative changes. The doctor recommended "[a] neurosurgical consultation for the tight cervical stenosis and myelomalacia should occur in the near future."[2]

Claimant was examined by the court-appointed physician, Dr. Vito Carabetta, on October 22, 2013. The doctor obtained a history, reviewed medical records and performed a physical examination. Dr. Carabetta diagnosed: 1) bilateral cubital tunnel syndrome, 2) left carpal tunnel syndrome, and 3) cervical spinal stenosis. Regarding causation, Dr. Carabetta opined:

> As we consider each diagnosis, a request has been made to address significant factors. The patient's health history, age, and genetic background really do not factor in with regard to the issue of the mild left carpal tunnel syndrome and the more substantial issue bilateral cubital tunnel syndrome. This seems to be related to the primary significant factor, sometimes referred to as the prevailing factor, namely his work activities. As we consider the cervical region, matters are different. Though his work activities may over the decades have contributed some, his genetic composition would be the primary issue. This would be an underlying factor that would predominate. His age would also enter into the equation, as this is expected to worsen as time goes by. He did not have any pre-existing condition

[2] P.H. Trans. (Nov. 12, 2013), Resp. Ex. A at 7.

that would factor into this, but his medical history of diabetes mellitus certainly does not help matters. His lifestyle factors would not have any real impact.[3]

As of November 12, 2013, claimant was having problems with his neck, left shoulder, elbows, and wrists as well as tingling and numbness in his fingers. Claimant testified that he did not have any problems with his neck before he started working at the Fairfax plant.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508 provides in relevant part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

---

[3] Dr. Carabetta's IME Report dated October 22, 2013, at 3-4.

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

The undersigned Board Member finds no error in the ALJ's preliminary hearing Order and adopts his finding that claimant did not sustain his burden to prove the accident was the prevailing factor in causing his alleged cervical injury.

In Dr. Fevurly's opinion, the cause of claimant's cervical cord impingement and myelomalacia is degenerative disk changes at C3-4 and bone spondylosis. Dr. Fevurly opined that claimant's genetics, living and aging caused the degenerative changes. Moreover, Dr. Carabetta, the court-appointed neutral physician, concluded that although claimant's work activities over the decades may have contributed to claimant's cervical spinal stenosis, such work activity was not the prevailing or primary factor. Rather, in Dr. Carabetta's opinion, claimant's genetics was a "predominate" factor and claimant's age and history of diabetes combined to be prevailing factors in causing claimant's cervical disease.

This Board Member considered Dr. Prostic's opinions and claimant's testimony, but, under the circumstances of this claim, finds the opinions of Drs. Carabetta and Fevurly more credible and persuasive.

CONCLUSION

This Board Member finds claimant did not sustain his burden of proof that his alleged repetitive trauma was the prevailing factor in causing his cervical injury, medical condition and disability or impairment, nor did he prove his cervical disease arose out of and in the course of his employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

WHEREFORE, the undersigned Board Member finds that the November 13, 2013, preliminary hearing Order entered by ALJ Steven Howard is affirmed.

IT IS SO ORDERED.

Dated this 3rd day of March, 2014.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Michael Wallace, Attorney for Claimant
cpb@mrwallaw.com

Elizabeth Dotson, Attorney for Respondent
edotson@mvplaw.com; mvpkc@mvplaw.com

Honorable Steven Howard, ALJ

[4] K.S.A. 2012 Supp. 44-534a.

[5] K.S.A. 2012 Supp. 44-555c(k).